No. 15843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER CHAUNT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S OPENING BRIEF.

JOHN W. PORTER,
1344 Garnet Street,
San Diego 9, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 15843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER CHAUNT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, cancelling the certificate of citizenship of this appellant issued November 28, 1940. Jurisdiction is conferred upon this Court by 28 U. S. C. 1291.

Statement of the Case.

The action below was commenced by a complaint filed October 1, 1953 [T. 2].* After answer, and following denial of motions to dismiss [T. 59], an amended complaint and a second amended complaint were filed [T. 105, 180]. Trial was had upon the latter, on March 5, 6, 7, 8 and 12, 1957 [R. 1-550], without a jury.

---

*References to the Clerk's Transcript are indicated by "T"; those to the Reporter's Transcript by "R."

Findings of fact and conclusions of law favorable to the Government were prepared and filed, together with the judgment [T. 561], and objections to them were overruled [T. 558]. Judgment was entered April 24, 1957.

The evidence at the trial consisted largely of testimony and documents offered by the plaintiff. Appellant testified only as an adverse party called by the Government [R. 532-538]. The evidence offered by him was in the form of documents [Deft. Exs. A to E, incl.].

The appeal is from the judgment as entered. By stipulation, approved by this Court, it was abated pending decision by the Supreme Court of the United States of the cases relied upon under Point I, below.

Statement of Points.

Appellant here asserts the following points:

1. That the evidence received at the trial was insufficient to support the findings of the trial court, and that the findings of the trial court are not supported by the evidence.

2. That the findings of the trial court are insufficient to support the judgment of cancellation and such judgment is not supported by the findings or the evidence.

3. That the judgment of naturalization was *res judicata* and conclusive of all matters covered by the complaint below.

4. That the statute under which the second amended complaint is drawn, Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. A. 1451) on its face and in its application, is an *ex post facto* law and a bill of attainder violative of Article I, Section 9, of the Constitution.

5. That the statute on its face and as applied to the appellant deprives the appellant of due process of law in violation of the Fifth Amendment to the United States Constitution.

Questions Presented.

1. Whether the judgment, in so far as it is predicated upon findings of concealment and misrepresentation respecting Communist Party connection must not be reversed under the controlling authority of *Maisenberg v. United States,* 356 U. S. ....., 2 L. Ed. 2d 1056.

2. Whether concealment and misrepresentation respecting appellant's arrests support the judgment considering that (a) the trial court failed to find that any of the arrests were lawful and (b) that at least two of the three arrests relied upon appear, on the face of the record, to have been illegal because of conduct protected by, and under ordinances invalidated by, the First and Fourteenth Amendments.

3. Whether the decree granting appellant's petition for naturalization on November 28, 1940, was not *res judicata,* concluding finally all of the issues raised here in the complaint and the findings.

Summary of Argument.

The pleadings and findings in this case turn upon two clusters of facts, one relating to claimed concealment and misrepresentation by appellant of his status in the Communist Party and his basic political views; the other to fraudulent dissembling as to certain arrests.

The first of these branches of the case is disposed of by *Maisenberg v. United States,* 356 U. S. ....., 2 L. Ed. 2d 1056, read together with *Nowak v. United States,* 356 U. S. ....., 2 L. Ed. 2d 1048, decided after entry of the

judgment below. The other branch of the case gives way because two of the three arrests found to have been fraudulently concealed were illegal. This flaw undermines fatally the remaining support for the judgment.

Ultimately, principles of finality of decision disregarded by the trial court barred this action *ab initio,* and require that it now be dismissed; otherwise, serious questions of constitutionality must be confronted.

I.

In so Far as the Judgment Rests Upon Findings That Appellant Wilfully Concealed That He Was an Active and Leading Member of the Communist Party, and Fraudulently Misrepresented the Contrary, It Is Controlled by Maisenberg and Nowak, and Accordingly Must Be Reversed.

The complaint below (actually the second amended compaint), like that in *Maisenberg,* sought denaturalization of appellant upon both of the grounds prescribed in Section 340(a) of the Immigration and Naturalization Act of 1952.[1] Its allegations were found true by the trial court virtually *in haec verba.*[2] In respects identical to those which decided *Maisenberg,* the findings are without

---

[1]66 Stat. 260, 8 U. S. C., Sec. 1451(a):

"It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation. . . ."

[2]The findings as to each cause of action are stated separately in the language of the second amended complaint, except for necessary formal adaptations. At some points the identity between the two causes incongruity; see, for example, Findings of Fact, First Cause of Action, par. VI, first line.

support in the evidence. It follows that the judgment, *pro tanto,* must be reversed.

(a) As were both *Nowak* and *Maisenberg,* appellant was naturalized under the Nationality Act of 1906 (34 Stat. 596). Like them he was asked the multiple question, No. 28 of the preliminary naturalization form [Govt. Ex. 2-A], which reads: "Are you a believer in anarchy? . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? . . ." The holding of those cases, that the question "was too ambiguous to sustain" a finding of fraud predicated only on other findings of Communist Party membership governs this one.

(b) *Nowak* also held that the "fact that Nowak was an active member and functionary in the (Communist Party) does not of itself suffice to establish that Nowak knew of the Party's illegal advocacy." "Fragmentary episodes" involving "sporadic statements," all "equivocal," were insufficient to make up the deficiency.

The same "vital link in the Government's chain of proof" is missing in this case. To paraphrase a concluding sentence of the *Maisenberg* opinion, there is no evidence in the record that Chaunt himself ever advocated revolutionary action or that he was aware that the Party proposed to take such action.[3] (*Cf., Yates v. United States,* 354 U. S. 298, 319-322.) Here indeed there are no statements, equivocal or otherwise, nor any circum-

---

[3]There is not even a finding to this effect with respect to the first cause of action, the concealment cause. The separate findings as to the second, misrepresentation, cause of action include recitals, lifted from the complaint, that appellant "well knew" the various dogmas attributed there to the Communist Party.

stances from which the inference of guilty knowledge might reasonably be drawn.[4]

Paraphrasing again, this time from *Nowak,* under the strict standard of proof by which this case must be judged the record shows at best from the Government's standpoint that Chaunt was an active member, leader and functionary of the Communist Party.[5] But this proof does not suffice to make out the Government's case, for Congress in the Immigration and Naturalization Act of 1952 has not made membership or holding office in the Communist Party a ground for loss of citizenship. The proof here falls far "short of the 'clear, unequivocal and convincing' evidence needed to support a decree of naturalization." (*Maisenberg, supra.*)

II.

Those Portions of the Judgment Which Rest Upon Findings of Fraudulent Concealment of Arrests Are Erroneous Because the Trial Court Failed to Find That Any of the Arrests Were Lawful, and at Least Two of the Three Arrests Found to Have Been Concealed Were Illegal.

This case would be disposed of by *Maisenberg* but for the fact that the judgment rests upon independent grounds not involved in that case. Here the complaint alleged and the district judge found that in his naturalization proceeding appellant denied ever having been arrested, when he had actually been apprehended and charged on three

---

[4]The most pertinent quotation from appellant points the other way. Rushmore recalls Chaunt saying that the revolution would *not* be started by the Communist Party but by the workers at large [T. 244].

[5]In this discussion, as in the *Nowak* and *Maisenberg* opinions, it is assumed for convenience that the record adequately establishes in addition "illegal" advocacy by the Communist Party itself.

different occasions. The occasions and the charges, as set forth in identical language in each count of the complaint and the findings,[6] were:

> ". . . (2) that prior to said naturalization the defendant had been arrested and charged with violation of the city ordinances of the City of New Haven, Connecticut as follows: (a) On or about July 30, 1929, defendant was arrested on the charge that 'at said city and town of New Haven, Peter Chaunt, of the said city and town of New Haven, did then and there distribute in a public street, to wit: Ashmun Street, certain hand-bills against the peace of the State, of evil example, and contrary to the ordinance in such case made and provided. Ord. 729.' Disposition, 'Plea—not guilty—Discharged'; (b) On or about December 21, 1929, defendant was arrested on the charge that 'at said city and town of New Haven, Peter Chaunt, temporarily of said city and town, did make an oration, harangue, or other public demonstration in New Haven Green, outside of the churches. Pages 609 Charter and Ordinances.' Disposition, 'Demurrer filed 12-27-29. Demurrer overruled—Whitaker 12-27-28, plea—not guilty, Found J. S.'; (c) that on the 11th day of March, 1930, defendant was arrested and charged at said city and town of New Haven that he 'did commit, violate, Peter Chaunt, general breach of peace'; 'plea N. G., finding G, ordered to be imprisoned in New Haven County Jail and/or to pay fine of $25.00 to stand committed until judgment satisfied. Appealed.' "

---

[6]An additional arrest was alleged in each cause of action of the complaint but does not appear in the findings.

Quite apart from their validity as a matter of law, to be discussed below, it may be noted that none of the arrests with which appellant is charged involves the slightest suggestion of moral taint. The fact that no evidence was offered—and hence, we must assume, that none could be found—of any other blemish on appellant's record at any time suggests that it must have been quite exemplary.

A. The Judgment Must Be Reversed Because There Is No Finding That Any of the Arrests Were Valid.

In a case whose authority and reasoning have withstood repeated distinction, the Third Circuit held that concealment of false arrests is not a basis for denaturalization on fraud grounds. (*United States v. Kessler* (C. A. 3), 213 F. 2d 53.) Such arrests are not a material fact which can throw any light on the character of the applicant; they are a nullity; and their concealment, as a matter of law, cannot be fraudulent. The reasoning and authority of this case are unanswerable in the analogous circumstances presented here.[7]

It is self-evident that to conceal or misrepresent a nullity is no concealment or misrepresentation, and therefore not a fraudulent concealment or misrepresentation. If I deny that I was ever convicted, when a judgment against me in a criminal case has been set aside and wiped out, I do not misrepresent. Yet the *fact* is I was once convicted. The contradiction is resolved by recognition that the only fact relevant to my qualifications for citizenship is whether I was ever *validly* convicted of any offense. My conviction upon an invalid charge can throw no light upon me, only upon those responsible for it.

The same is true of an arrest. While the bearing of even a valid arrest upon a man's character is at least questionable, the fact that he was once, twice or thrice arrested illegally contributes exactly nothing to his history. Whether the invalidity of the charge be factual (mistaken identity) or legal (non-existence of the offense charged), (*United States v. Kessler, supra*), a false arrest cannot

---

[7]See Note, Developments in the Law—Immigration and Nationality, 66 Harvard Law Review, 643, 720 and n. 608.

in reason be a fact material to any issue in a naturalization proceeding.

Since this is a denaturalization case, the burden of proof "is substantially identical with that required in criminal cases" (*Klapprott v. United States,* 335 U. S. 601, 612), and every element of the charge must be established. Both "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." (*Schneiderman v. United States,* 320 U. S. 118, 158.) An appellate court must make an "independent, close scrutiny" of the record (*United States v. Anastasio* (C. A. 3), 226 F. 2d 912, 919), in order to satisfy itself that the record leaves no "issue in doubt." (*Knauer v. United States,* 328 U. S. 654, 656.) Thus it was incumbent upon the Government here to prove that the arrests alleged to have been concealed by appellant were valid. But there is no evidence of this. It was not alleged in the complaint. It is not found by the trial judge either as to all or any of the arrests found to have been concealed.

B. At Least Two of the Three Arrests as a Matter of Law Were Invalid.

The record forecloses any implied finding or presumption of regularity to fill the gap. For at least two of the arrests were made under municipal ordinances which, on their face, collide with the First and Fourteenth Amendments. No presumption of constitutionality supports them. (*United States v. Carolene Products Co.,* 304 U. S. 144, 152-153, n. 4.) As examination will show, the charges drawn under these laws obviously were void.

The first arrest, on July 30, 1929, in New Haven, was under a complaint charging that Peter Chaunt "did then and there distribute in a public Street . . . certain handbills against the peace of the State, of evil example, and

contrary to the Ordinance in such case made and provided." [Govt. Ex. 1-A.] New Haven could not have required appellant to secure a permit to distribute decent handbills. (*Schneider v. State,* 308 U. S. 147; *Jamison v. Texas,* 318 U. S. 413.) The First and Fourteenth Amendments equally forbid his conviction for distributing them unless he were shown to have been disorderly or dangerously provocative. *Cantwell v. Connecticut,* 310 U. S. 296; *cf., Chaplinsky v. New Hampshire,* 315 U. S. 568.)

Government's Exhibit 1-B records the complaint against appellant on December 21, 1929, that he "did make an oration, harangue or other public demonstration in New Haven Green, outside of the churches." This is a charge purely of speech-making, without any attendant circumstances to warrant police interference with appellant's constitutionally-guaranteed right to talk. The cases just cited, and a hundred others before and since, declare that speech cannot be criminal except it incites action or plays up "fighting words." (See *Kovacs v. Cooper,* 336 U. S. 77.) The exceptions not being alleged, it must be assumed that they were not present.

Two of the three charges about which appellant is alleged to have deceived the government thus prove to be invalid as a matter of law. The arrests under them were therefore illegal and false. They were nullities. As such, the fact that they had occurred was not material to a consideration of appellant's application for citizenship, and was even beyond the examiner's proper power to inquire. (*United States v. Kessler, supra,* 213 F. 2d 53.)

The evidence as to the disposition of the criminal proceedings here casts further doubt upon the validity of the arrests and the findings of fraudulent concealment. In

the first case appellant was "Discharged" after a plea and finding of not guilty [Govt. Ex. 1-A]. Was the case thrown out because they had the wrong man? Or for want of evidence? Or, perhaps, because the magistrate recognized that the charge on the ordinance could not be squared with the First Amendment? On any of these hypotheses this arrest was false, not an arrest at all.

The record as to the disposition of the second charge is just as ambiguous. What happened in this case [Govt. Ex. 1-B] according to the findings was: "Disposition, 'Demurrer filed 12-27-29. Demurrer overruled—Whitaker 12-27-28, plea—not guilty, Found J. S.'" No translation or interpretation of the initials "J. S." appears. Standard lists of legal abbreviations do not include them. (1 C. J., Secs. 78-79.) There is nothing to support an inference that appellant's speech making passed the clear and present danger point any more than did that of Cantwell in a similar case from the same state. (*Cantwell v. Connecticut, supra,* 310 U. S. 296.)

The record on the arrest of March 11, 1930 [Govt. Exs. 1-D and 1-E] is equally unsatisfactory. While it indicates that appellant was later convicted on the general breach of peace charge brought that day, it ends with the entry "Appealed," without anything to show what became of the appeal. For all that appears, appellant's conviction may have been reversed on any of the multitude of grounds on which reversals customarily rest. Or it may have been based upon the breadth and vagueness of the statute (*Cantwell v. Connecticut, supra*), or perhaps its application to conduct protected by the First and Fourteenth Amendments to the Constitution.

Even assuming that the arrest of March 11, 1930, should be considered valid, in contrast to the first two

which on the face of the record must fall before the Constitution, the judgment still cannot stand. For there is no *finding* that any of the arrests were valid. No presumption avails to fill the gap. Moreover, the trial court's finding of fraud in the concealment and misrepresentation of the arrests is general and is made to rest equally upon all three. But at least two, as we have seen, were not arrests at all. They could not, as a matter of law, be fraudulently concealed. Two of the three legs upon which the finding rests thus collapse. The finding cannot stand on the one remaining for the finding itself becomes ambiguous. There is no way of telling whether the trial judge would have made it if there had been only the one valid arrest. This uncertainty is fatal to the finding. (*Stromberg v. California,* 283 U. S. 359, 367-368.) Without the finding, the judgment must fall.

III.

The Naturalization Decree Was Res Judicata and Conclusive of All Issues Covered by the Pleadings and Findings Below.

It is often assumed that the defense of *res judicata* is not available in denaturalization proceedings, and this plainly was the view of the trial court. This assumption rests upon imprecise reading of early decisions of the Supreme Court and has not been laid to rest by the conflicting views of the lower federal courts. (See *Developments in the Law—Immigration and Nationality,* 66 Harv. L. Rev. 643, 725, and cases there cited.) Examination of the decisions relied on and of the important language of Mr. Justice Douglas' opinion for the majority in *Knauer v. United States,* 328 U. S. 654, 670-674, quoted below, discloses that there is no case squarely holding that *issues actually litigated or subject to litigation* in the

naturalization proceeding may be re-opened by the Government later on in a proceeding to revoke the naturalization decree. And it seems significant that Congress, which must be presumed to have been aware of the state of the law on this question when it adopted the 1952 Act, said nothing expressive of an intention that *res judicata* should not apply in denaturalization cases—like this one—even where the Government relies only upon instrinsic fraud. While the elimination of the ground of illegal procurement does away with many situations where the defense was inapplicable because the record on its face showed the absence of an essential, "jurisdictional" qualification (for example, *United States v. Ness,* 245 U. S. 319), the language of Section 340 of the new statute is entirely open to the contention, which appellant makes here, that the naturalization decree is vulnerable to attack upon fraud grounds only for what has traditionally been known as extrinsic fraud, and not for any misstatement occurring in the proceeding itself.

It was in fact *United States v. Ness, supra,* which was thought to establish the proposition that *res judicata* is not defense to denaturalization. The opinion, however, as Professor Roche observes in his searching article, *Statutory Denaturalization: 1906-51,* 13 U. of Pitts. L. Rev. 276, 286, understood that there was no right of appeal by the Government from the decree of naturalization. Mr. Justice Brandeis wrote in *Ness* (245 U. S. at 326):

> "For Congress did not see fit to provide [in the 1906 Act] for a direct review by writ of error or appeal. But where fraud or illegality is charged, the Act affords, under Sec. 15, a remedy by an independent suit . . ."

Subsequently the Government's right of appeal in naturalization cases was confirmed. (*Tutun v. United States,* 270 U. S. 568.) But the Court did not again consider thoroughly the question of *res judicata.* To quote the Roche article:

> "Mr. Justice Holmes in the *Maney* case (Maney v. United States, 278 U. S. 17, 23) leaned heavily on the *Ness* case and dismissed the defense of res judicata in a sentence. The inadequacy of res judicata as a defense against denaturalization has since been assumed by the Court without argument or discussion."

In the *Maney* case the defendant contended that to refuse to recognize the defense of *res judicata* would be to give "special treatment" to naturalization decrees. The point is disposed of characteristically in the final sentence of Mr. Justice Holmes' opinion:

> "But it hardly can be called special treatment to say that a record that discloses on its face that the judgment transcends the power of the judge may be declared void in the interest of the sovereign who gave to the judge whatever power he had."

The weakness of the *Ness* and *Maney* cases, as well as of *Johannessen v. United States,* 225 U. S. 227, also commonly relied upon, as authority against the availability of *res judicata,* is placed beyond dispute when it is recognized that all of them involved decrees upon records which on their face exhibited the absence of an indispensable element. Thus in *Ness* there was an admitted failure by the applicant to accompany his petition for naturalization with the required certificate of arrival. In *Maney* the certificate of arrival was filed considerably after the petition. *Johannessen* was an *ex parte* judg-

ment to which the doctrine of *res judicata* was inapplicable. In two other often-cited cases similar defects of record were involved and, probably for that reason, the issue of *res judicata* was not even raised: *United States v. Ginsberg,* 243 U. S. 472, and *United States v. Thind,* 261 U. S. 204. All of these cases, therefore, involved decrees which were void for want of substantive jurisdiction.

But *res judicata* "is not applicable where the judgment in the original action is void," as for lack of jurisdiction, failure to give notice or hearing, or the incompetency of the tribunal. (*Restatement of Judgments,* Sec. 1, Comment c.) The principle of finality of judgments of course is operative only with respect to judgments which are claimed to be voidable for some cause such as fraud or mistake. Hence cases dealing with void naturalization decrees are not apt.

The latest extensive statement by the Supreme Court occurs in *Knauer v. United States, supra,* apart from a passing reference in *Schneiderman,* 320 U. S. 118, 124. The point upon which *Knauer* turned in the Court was the fraud found to have been committed by Knauer in taking the oath of allegiance after his admission to citizenship. In answer to the assertion that *res judicata* barred the revocation proceeding, the majority opinion by Mr. Justice Douglas begins by observing that where a decree is based upon what is later found to have been perjured testimony, the rule of *res judicata* under *United States v. Throckmorton,* 98 U. S. 61, 66, "goes no further than to say that the issue of fraud can become *res judicata* in the judgment sought to be set aside." The opinion then continues with language which clearly draws the line to which the Court has actually gone in foreclos-

ing this defense, and thus marks the degree to which the question is still open:

> *"We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization* [here quoting Sec. 4, subdiv. Fourth of the 1906 Act as amended]. *Those facts relate to the past—to behavior and conduct.* But the oath is in a different category. It relates to a state of mind and is a promise of future conduct . . . hence the issue of fraud *in the oath cannot become res judicata* in the decree sought to be set aside . . . [it] was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated." (328 U. S. 654, 670-671.) (Emphasis supplied.)

The line could not have been defined more clearly.[8] Whether *res judicata* is a defense in a revocation suit based upon fraud consisting of perjured testimony in the naturalization is a question explicitly left open and undecided. No later statement by the Court, let alone any decision of this question, is reported. This evidently was recognized by this court in citing *Knauer* in its opinion in *Stacher v. United States,* 258 F. 2d 112, 120.

There is, then, no obstacle to the application of *res judicata* in the present case. Reasons of judicial policy and the public interest combine to support it. Denaturalization is a fraud action in which the universally-recognized ele-

---

[8]It was stated differently but with equal force by the same member of the Court, concurring in *Schneiderman v. United States, supra,* at 161-162: "Fraud connotes perjury, concealment, falsification, misrepresentation or the like. But a certificate is illegally, as distinguished from fraudulently, procured when it is obtained without compliance with a condition precedent to the authority of the Court to grant a petition for naturalization."

ments of a cause of action for misrepresentation are indispensable. *Schneiderman v. United States,* 320 U. S. 118, 161-162; *United States v. Anastasio* (C. A. 3), 226 F. 2d 912.) The principle of finality of judgments, as understood today, declares that final judgments are voidable for fraud only if the fraud is of a sort to prevent knowledge of the claim or defense, or an opportunity to litigate it. (*Restatement of Judgments,* Sec. 121.) A judgment obtained merely by false or perjured testimony, or the production of false documents or even by conspiracy between the prevailing party and witnesses, is not open to later attack. (*Restatement of Judgments,* Sec. 126.) That is our case. The very complaint of the Government and the findings of the Court below alike declare that "in the proceedings which led to his naturalization" the appellant misrepresented and misled them as to his past behavior and conduct. (See *Knauer v. United States, supra.*) This is what once was called intrinsic fraud, what the *Restatement* (*supra*) calls securing a judgment by false or perjured evidence. Whichever formula is preferred the judgment, having determined issues litigable and actually litigated, is conclusive.

In an effort to escape this result the Government in its complaint and the trial judge in the findings declared that as a result of the concealment and misrepresentation by the appellant, the Government and the court were "foreclosed" from conducting the investigation which would have disclosed falsity. But this is mere conclusion. It is contrary to facts which the courts judicially know—the vast investigative resources of the federal government, the availability in newspaper files, court records, credit agencies and other sources of information about an applicant for citizenship in the areas where the petition discloses he has lived. It is simply not true to

say that the Government was "prevented" from conducting any investigation which its agents, in their discretion, might have deemed to be appropriate in the circumstances. All that can be said is that they chose to rely upon the information furnished by the applicant. If their reliance proved to be misplaced, as we must now assume under the findings, the issues nonetheless were raised by the inquiry in the naturalization proceeding and were finally determined there.

The "Preliminary Form for Petition for Naturalization" [Govt. Ex. 2-A], which contained the now famous Question 28 (Point I, *supra*) and the denial of arrests (Question 30) is dated November 8, 1939. The decree of citizenship was granted more than a year later, on November 28, 1940. Thus the Government had ample time (and, as the record shows, could have secured more) to verify all the information furnished by appellant if it chose to do so. There is no claim, proof or finding of diligence on the part of the Naturalization Service.

Since this is both a fraud and a denaturalization case, it was incumbent upon the plaintiff below to prove by the requisite margin (a) that it did not know about the arrests of appellant of which it now complains, (b) that it could not with the exercise of reasonable diligence have learned of them and (c) that it reasonably relied upon his statements. Relief from a judgment will always be denied where the aggrieved party failed to employ reasonable care to protect his own interests. (*Restatement of Judgments,* Sec. 129.)

In the circumstances presented here denial of the claim of *res judicata* would give rise immediately to difficult and basic constitutional questions. One is whether reopening of the judgment at the direction of the Congress

in the statute infringes the judicial power conferred in Article III. (See Rutledge, J., concurring in *Schneiderman, supra,* 320 U. S. at 165.) The other is the applicability of the *ex post facto* clause of Article I and of the due process clause. These questions need not be resolved if long-prevailing rules of finality of judgments are observed, as they plainly should be here.

Conclusion.

For all of the foregoing reasons the judgment of the District Court should be reversed with directions to dismiss the action.

Respectfully submitted,

JOHN W. PORTER,

Attorney for Appellant.